[ARGUMENT NOT YET SCHEDULED]
UNITED STATES COURT OF APPEALS
***for the* District of Columbia Circuit**

In re: ABD AL-RAHIM HUSSEIN AL-NASHIRI,	)	No. 18-1279
	)	**REPLY IN SUPPORT OF PETITIONER'S MOTION FOR A STAY**
	)	Dated: November 5, 2018

REPLY

Petitioner sought a writ from this Court to remedy serious judicial misconduct in a capital case and moved for a stay of proceedings directly tainted by that misconduct while this Court decides what relief, if any, is warranted. That stay will preserve the status quo, afford this Court maximum freedom of action, and contain the harms that have already resulted.

No party has identified any actual prejudice if a stay is entered. The only risk of prejudice is that generally attendant to delay in criminal cases. Respondents, for their part, have already delayed Petitioner's case for sixteen years, including nearly a decade during which it actively avoided bringing him before proceedings of any kind. And so, as the only party who can complain of delay with clean hands, Petitioner asks this Court to enter a stay because the marginal risk of unwarranted delay is far outweighed by the certain prejudice that will result if the tainted proceedings below continue.

I. The CMCR's most recent order demonstrates why a stay is necessary.

A day after Respondents filed their opposition brief last Thursday, the Court of Military Commission Review ("CMCR") turned around a highly unusual order. *See* Respondents 28(j) Letter (Nov. 2, 2018) ("CMCR Stay Order"). Ostensibly denying Petitioner's three-week old motion for a stay, this order also appears to short circuit the CMCR's own briefing schedule in Respondents' interlocutory appeal, which was previously due to conclude this Wednesday, and to "return jurisdiction over this case to the military commission." *Id*. at 5.

The immediate consequence of this order is simply to require this Court to direct any stay to both the CMCR and the military commission in Guantanamo. But the CMCR's haste in issuing this order fits a troubling pattern. This is the third time that the CMCR has issued an order seemingly designed to undercut this Court's ongoing review.

In *Mohammed*, this Court issued an order to show cause on another claim of judicial misconduct that arose in the course of a CMCR proceeding and that the CMCR had also summarily dismissed. The CMCR, in turn, rushed to issue its merits decision, even dispensing with oral argument on a novel jurisdictional question. Respondents then argued (albeit unsuccessfully) that this Court's review was moot. *In re Mohammad*, 866 F.3d 473 (D.C. Cir. 2017).

Then, in this case, the CMCR summarily denied a motion to intervene filed by some of Petitioner's former counsel, who then appealed to this Court. *Spears v. United States*, Case No. 18-1087 (D.C. Cir., filed Mar. 30, 2018). In the course of hearing that appeal, this Court ordered Respondents to provide discovery that they had refused to provide in the military commission proceedings. Respondents responded by rushing to file a notice in the CMCR, withdrawing their previous opposition to the appellant's intervention motion, and the CMCR *sua sponte* reconsidered its previous denial of that motion in order to moot the direct appeal pending in this Court.

And now again, Petitioner sought this Court's intervention after the CMCR summarily denied a well-founded claim of judicial misconduct, a claim that affected the very orders under review by the CMCR. A week later, the CMCR rushed to issue its merits decision on numerous issues of first impression, again dispensing with oral argument. Petitioner promptly sought a stay from the CMCR that it declined to act upon for two weeks. He then moved for a stay in this Court, fearing exactly what has now happened. Because after this Court issued a briefing schedule on his motion for a stay last Monday, Respondents rushed to notify the CMCR and the CMCR, in turn, rushed to issue an order that was, again, evidently designed to disrupt this Court's review.

Petitioner accepts that the ordinary divestiture rule does not technically apply here, given that the form of this Court's review is via an extraordinary writ. Nevertheless, the CMCR should still be bound as a matter of sound judicial practice to "not interfere with this court's jurisdiction," once this Court has undertaken review on the merits. *Cf. United States v. McHugh*, 528 F.3d 538, 540 (7th Cir. 2008). Petitioner can only speculate as to why the CMCR assumes such an adversarial posture toward this Court. But the CMCR's Stay Order, which seems to fit a pattern of a lower court regularly seeking to undermine this Court's review of its actions, highlights why a stay is necessary to preserve the status quo.

II. Petitioner is likely to succeed on the merits.

In opposing a stay, Respondents put their primary emphasis on their supposed likelihood of success on the merits. The most notable thing about their ostensible merits argument, however, which the CMCR then echoed in its Stay Order, are the merits they no longer appear to dispute.

Neither Respondents nor the CMCR continue to dispute that Col Spath is now an immigration judge. They do not dispute that he was secretly negotiating with Respondents for this job for at least the past year. They do not dispute that he actively concealed this fact, including in a declaration he filed with the CMCR last March. *See United States v. Nashiri*, Case No. 18-002, Opinion, at 16

(U.S.C.M.C.R., Oct. 12, 2018) ("CMCR Opinion").[1] They do not dispute that doing so violated clear standards governing the integrity of the judiciary. And they do not dispute that a reasonable observer, knowing all the facts, could conclude that Col Spath's then-inexplicable behavior on the bench – including falsely accusing Petitioner's counsel of propagating "fake news" – was the behavior of an impatient suppliant for employment to a party in this case.

Respondents instead claim they are likely to succeed on the merits because, they suggest, Petitioner can obtain remedies from the military commission. This suggestion, however, misrepresents the posture of this case, is inadequate to remedy the harms at issue, and asks for a futile act.

A. Petitioner has exhausted all other avenues for relief.

Petitioner raised Col Spath's apparent misconduct before the CMCR on September 13, 2018. This was one week after Respondents denied his request for information on their having hired Col Spath as an immigration judge. Respondents opposed Petitioner's motion, arguing that the evidence Petitioner brought forward was speculative and failed, in any event, to indicate judicial misconduct. Based on the same factual record presented to this Court, the CMCR ruled against Petitioner

[1] https://www.mc.mil/Portals/0/pdfs/Nashiri18-002/USCMCR%2018-002%20114-Nash%20Merits%20Dec%20(Oct%2011%202018)%20w%20App%20A_PUBLIC.pdf

on the merits,[2] holding no "reasonable and informed observer would question the judge's impartiality." Order, *United States v. Al-Nashiri*, Case No. 18-002 (Sep. 28, 2018) (cleaned up). This merits ruling can only be reviewed by this Court, which is why "the duty to ensure judicial conduct in accordance with the Canons" now resides in this Court. *Scott v. United States*, 559 A. 2d 745, 756 (D.C. Ct. App. 1989).

Respondents and the CMCR both now contend that this Court's review is premature because no factual findings were made at the trial level. This argument, however, is specious.[3] All of the facts presented to the CMCR and to this Court are matters of public record. And the only relevant facts that remain unknown are: 1) the date Col Spath applied for employment, 2) his communications in negotiating for that employment, and 3) the date Respondents formally hired him. No hearing is required to ascertain these facts. They too are matters of public record, known to Respondents, and subject to judicial notice.

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[2] The only additional fact presented to this Court was Respondents' public announcement of Col Spath's hiring.

[3] The CMCR's claimed inability to find facts outside the trial record is also belied by its own conduct during Respondents' interlocutory appeal. In its merits decision, the CMCR – over dissent and over Petitioner's specific objections – engaged in broad fact-finding, ruling on disputed matters of fact for which there was no record below (indeed on the very matters Col Spath had refused to hold a hearing or compel discovery). And a review of the docket shows that the CMCR issued at least two discovery orders as part of Respondents' interlocutory appeal.

Moreover, these unknown facts are also unnecessary to Petitioner's success on the merits. They go only to the scope of the remedy. The record suggests that Col Spath formed the intent to retire on or about April 11, 2017, the day he issued his self-described "aggressive" trial schedule. As a matter of *remedy*, this Court could limit the vacatur rulings below to those made proximate and subsequent to that date. Respondents can come forward with other dates to limit the scope of that remedy. Or this Court could vacate the proceedings below in their entirety (effectively dismissing the current proceedings without prejudice), so that this capital prosecution can start afresh untainted by judicial misconduct. But the essential facts warranting relief – Col Spath's failure to disclose his intent to retire, his secret pursuit of employment with Respondents whilst presiding over Petitioner's case, and his histrionic behavior on the bench – were before the CMCR, are before this Court, and are not subject to reasonable dispute.

It is unclear how a military commission could vary from the conclusion of its superior court that these facts are insufficient to "question the judge's impartiality." The relief necessary to remedy the judicial misconduct presented here, therefore, can only come from this Court.

B. The military commission is incapable of providing a remedy adequate to the harm.

Even if the period of Col Spath's misconduct is traced only back to April 11, 2017, *all* of the orders giving rise to the CMCR jurisdiction over Respondents' interlocutory appeal were tainted. In fact, the CMCR predicated its jurisdiction on a declaration Col Spath submitted, stating the conditions under which he would lift his abatement, where he continued to conceal his imminent plans to retire and accept employment from Respondents. CMCR Opinion, at 16.

The misconduct at issue here, therefore, affected the "whole adjudicatory framework below." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1910 (2016). Regardless of whether the CMCR had ruled for or against Petitioner on any issue, Petitioner and the public had a right to judicial proceedings untainted by judicial misconduct. *See Floroius v. Gonzales*, 498 F.3d 746, 748 (7th Cir. 2007). That is why it did not matter that the misconduct at issue had little, if any, effect on the result under review in *Williams*. And it is why a new trial was ordered in *Scott* even after the government made "commendable concessions" to restore "public confidence in the integrity of the judiciary." *Scott*, 559 A. 2d at 756.

If Petitioner is right on the merits, therefore, the CMCR's tainted proceedings must also be vacated. The CMCR has now declined to vacate its own proceedings and returned the case to the military commission. And because the military commission cannot vacate the proceedings of its supervising court, the

relief necessary to remedy the judicial misconduct presented here can only come from this Court.

C. Even the partial relief supposedly available from the military commission is illusory.

Respondents finally argue that the military commission "*might* narrow the scope of petitioner's claim, or moot it altogether, by reconsidering on the merits the decisions made by her predecessor." Opp. 9 (emphasis added). Such relief is, as Respondents recognize, speculative. But even if the military commission judge entertains such motions, her authority to grant relief is a mirage.

In its merits decision on Respondents' interlocutory appeal, the CMCR did not limit itself to the propriety of Col Spath's abatement order. Rather, both Col Spath and Respondents effectively used his abatement order to create a certified question procedure and asked the CMCR to *affirm* more than a dozen orders Col Spath had issued on the merits. *See*, *e.g.*, AE348 Series, AE389 Series, AE392, AE393. Over Petitioner's objections, the CMCR obliged. Taking an exceptionally broad view of its "pendent jurisdiction," it decided numerous issues, including the scope of Petitioner's counsel rights, the composition of his defense team, and – over dissent – questions of fact outside the record. And in making these holdings, the CMCR declared that "these holdings are now the law-of-the-case and the law of the military commissions even if we did not have pendent jurisdiction to decide

them in addressing the merits of appellant's appeal of the abatement order." CMCR Opinion, at 37.

To the extent, therefore, that Respondents ask this Court to demure because Petitioner can file motions for reconsideration with the current military commission judge, Respondents ask this Court to demure in favor of the possibility of a futile act. The military commission cannot ignore the rulings or proceedings of its supervising court any more than the CMCR can ignore the proceedings of this Court. Even if the military commission judge is persuaded that Col Spath's orders were both tainted by misconduct and substantively wrong, her hands will be tied by the mandate rule and vertical stare decisis. *See*, *e.g.*, *Ex parte Sibbald v. United States*, 12 Pet. 488, 492 (1838); *Crocker v. Piedmont Aviation*, 49 F.3d 735, 739 (D.C. Cir. 1995). The relief necessary to remedy the judicial misconduct presented here, therefore, can only come from this Court.

III. The remaining stay factors support interim relief.

Respondents offer minimal argument on the remaining factors relevant to Petitioner's requested stay. Their arguments respecting irreparable harm to Petitioner are largely coextensive with their arguments on their likelihood of success on the merits. Petitioner therefore simply reiterates that the harms he imminently confronts, including the deprivation of counsel in a capital case, are directly traceable to orders tainted by judicial misconduct, orders that should never

have been entered if he is correct on the merits. And Respondents' sole claim of harm to themselves and the public is a generic "interest in avoiding unwarranted delays in the administration of justice." Opp. 11.

For the reasons given in Petitioner's motion, Respondents cannot credibly claim such an interest given the history of this case. Petitioner has been in Respondents' custody without any meaningful judicial review for the past sixteen years. For nearly all of that time, Respondents have made him the target of criminal charges, since 2003 in the Southern District of New York and since 2008 in the Guantanamo military commissions. Yet, they stalled for nearly a decade before commencing any proceedings against him and, since those proceedings got underway, they have engaged in a variety of litigation tactics – from obstinacy in discovery, to the filing of more than a dozen motions for reconsideration, to the taking of three interlocutory appeals – that have made those proceedings interminable. Respondents political and litigation choices over the past two decades, therefore, and not Petitioner's requested stay, are the source of any "unwarranted delays" in this case.

CONCLUSION

Petitioner asks this Court to enter a stay of the proceedings below, both before the CMCR and the military commission, pending its review of his petition. Doing so will preserve the status quo and protect Petitioner and the public's common interest in ensuring judicial integrity in capital trials.

Respectfully submitted,

Dated: November 5, 2018

/s/ Michel Paradis

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2018, copies of the foregoing Reply in Support of Petitioner's Motion to Stay were served on all relevant parties in the above captioned actions by electronic filing on the Court's ECF software.

By: /s/ Michel Paradis
Counsel for Petitioner

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Petitioner's Reply in Suppor of his Motion for a Stay, filed November 5, 2018, complies with the type-volume limitations imposed by Fed. R. App. P. 27(d)(2) because it contains 2,477 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)

Dated: November 5, 2018

Respectfully submitted,

/s/ Michel Paradis
Counsel for Petitioner

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

I. Parties and *Amici* Appearing Below

A. Abd Al-Rahim Hussein Al-Nashiri, *Appellee*

B. United States of America, *Appellant*

II. Parties and *amici* Appearing in this Court

A. Abd Al-Rahim Hussein Al-Nashiri, *Petitioner*

B. United States of America, *Respondent*

III. Rulings under Review

This case involves a petition for a writ of mandamus and prohibition to the Department of Defense and, in the alternative, to the United States Court of Military Commission Review, which issued an order denying the relief requested on September 28, 2018 and November 2, 2018.

IV. Related Cases

This case has not previously been filed with this court or any other court. Petitioner has a habeas petition in the United States District Court for the District of Columbia, Case No. 08-1207.

Dated: November 5, 2018

/s/ Michel Paradis
Counsel for Petitioner